

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2478 OF 2016**

Sheth Developers Limited

Petitioner

Vs

Vodafone India Limited

.. Respondent

Mr. Aditya Thakkar a/w Ms Detty Davis and Mr N. Bajpai i/b Juris Corp, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 06/04/2016

PC:

1. Heard Mr. Aditya Thakkar, learned counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 18.12.2015 passed by the learned Judge, presiding over Court Room No.28 of the Bombay City Civil Court at Bombay in Summons for Judgment No.184 of 2013 in Summary Suit No.1558 of 2013. By that order, the learned trial Judge granted conditional leave to defend to the petitioner, hereinafter referred to as 'defendant', subject to depositing sum of Rs. 3 Lacs in the Court within four weeks from the date of the order. After depositing the said amount, the defendant is permitted to file written statement within four weeks. The learned trial Judge further directed Registrar to invest the amount deposited by the defendant in nationalized bank initially for a period of one year and continue

to renew the deposit for the like period until further orders. On failure of the defendant to deposit the amount within the stipulated period, the plaintiff was given liberty to apply for further reliefs.

3. Respondent, hereinafter referred to as 'plaintiff', has instituted Summary Suit No.1558 of 2013 against the defendant under Order XXXVII of C.P.C. for recovery of Rs. 6,89,917.22 as per the particulars of claim annexed at Exh.L with further interest of Rs. 6,27,290.89 at the rate of 18% per annum from the date of filing of the suit till payment, cost of the suit and professional costs. Plaintiff took out Summons for Judgment No.184 of 2013 in July 2013. The defendant filed affidavit in reply of Basant Singh, constituted attorney of the defendant, opposing the Summons for Judgment. By the impugned order, the learned trial Judge granted leave to defend subject to imposing conditions. It is against this order, the defendant has instituted the present petition.

4. Mr. Thakkar has raised the following contentions:

(i) Bombay City Civil Court at Bombay has no territorial jurisdiction to entertain and try the suit. The plaintiff ought to have instituted suit in City Civil Court at Didonshi.

(ii) Plaintiff did not produce Vodafone customer agreement on record. Terms and conditions were also not produced on record. In the absence of written contract, the Summary Suit itself is not maintainable.

(iii) As the plaintiff did not produce the written contract, the defendant addressed a letter dated 8.8.2013 to the Advocate representing the plaintiff and in particular sought inspection of the Customer Application Form, Vadofone Customer Agreement Form, correspondence prior to the suit; and Terms of International Roaming and GPRA service. The plaintiff did not give inspection. The Court, therefore, ought to draw adverse inference against the plaintiff.

(iv) The plaintiff was obliged to inform the defendant as to when the credit limit is crossed. The plaintiff did not inform as to when the defendant crossed credit limit.

5. Mr.Thakkar relied upon the decisions which have been considered by the learned trial Judge in the impugned order and more particularly:

(1)Santosh Kumar Vs Bhai Mool Singh, A.I.R 1958 S.C. 321

(2)Raj Duggal Vs. Ramesh Kumar Bansal (1991) Supp (1)

Supreme Court Cases 191 to contend that if there is triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross examine his witnesses, leave to defend should not be denied. In the present case, as the plaintiff did not inform about crossing

credit limit, there is a fair dispute as regards the actual amount payable. He, therefore, submitted that the impugned order deserves to be set aside, thereby granting unconditional leave to defend.

6. I have considered the submissions advanced by Mr Thakkar. I have also perused the material on record. Perusal of paragraph 15 of the plaint shows that plaintiff asserted that the defendant is a subscriber of the plaintiff's services in Mumbai. The registered office of the plaintiff is situate at Lower Parel, Mumbai. The registered office of the defendant is situate in Mumbai. The bills are issued by the plaintiff from Lower Parel, Mumbai. The entire cause of action has arisen in Mumbai. Perusal of the bills annexed at Exhibit-D also shows address of the plaintiff at Lower Parel, Mumbai. It is no doubt true as contend by Mr. Thakkar that the learned trial Judge has not properly applied explanation to Section 20. In paragraph 7, the learned trial Judge observed that the plaintiff is a company and the explanation to Section 20 is applicable to this case. Explanation to Section 20 is applicable to the defendant and not to the plaintiff. Be that as it may. In paragraph 15, the plaintiff has specifically asserted that the bills are issued by the plaintiff from Lower Parel Mumbai and Exhibit-D also prima facie shows that the address of the plaintiff is Lower Parel, Mumbai. In view thereof, I do not find that the learned trial Judge committed any

error in holding that it has territorial jurisdiction to entertain and try the suit. As cause of action partly arose within the territorial limits of Bombay City Civil Court at Bombay, it has to be held that City Civil Court at Bombay has territorial jurisdiction to entertain and try the suit.

7. Mr. Thakkar submitted that the plaintiff did not produce Customer Agreement Form as also terms and conditions of International Roaming and GPRS service. The plaintiff did not produce the written contract. In the absence of the written contract, Summary Suit itself is not maintainable. It is not possible to accept this submission for more than one reason. In paragraph 4, the plaintiff asserted that on 17.10.2011 and 21.10.2011 the defendant issued purchase orders for one SIM Card each in the name of defendant's employee and on issuance of the said two purchase orders, the defendants acknowledged that they had received and read a copy of Vodafone Customer Agreement Form and agreed to be bound by the terms and conditions therein. Therefore, by executing the requisite documents, the defendant declared as a subscriber that they agreed to pay the one time installation fee, refundable security deposit and all charges associated with the services selected by the defendant. In paragraph 5, the plaintiff set out the terms and conditions which the defendant expressly agreed. Secondly, perusal of purchase order dated 21.10.2011 records

acknowledgement of defendant that they have received and read a copy of the Vodafone Customer Agreement Form and agreed to be bound by the terms and conditions therein. In view thereof, I do not find any merit in the submission of Mr .Thakkar that as the plaintiff did not produce Vodafone Customer Agreement and as there is no written contract between the parties, Summary Suit is not maintainable. Equally, I do not find any merit in the submission that adverse inference is liable to be drawn against the plaintiff for not giving inspection of documents sought by the defendants as per letter dated 8.8.2013. Once it is accepted that the defendant has acknowledged receipt of agreement form as also agreed to be bound by the terms and conditions, there is no question of the plaintiff giving inspection of documents which are already in the custody of the defendant.

8. Lastly, he submitted that the plaintiff did not inform the defendant as to when the credit limit is crossed. This aspect is considered by the learned trial Judge in paragraph 9 of the impugned order. The learned trial Judge has observed that the defendant has not disputed the purchase orders as also has not disputed the user or bill of the telephone. The defendants also did not make out a case about any terms and conditions regarding the intimation at the time of expiration of limits. I, therefore, do not find any merit in his submission also.

9. Mr Thakar relied upon the decision of the Apex Court in the

case of M/s Mechelec Engineers and Manufacturers Vs M/s Basic Equipment Corporation 1976 (4) SCC 687 to contend that as the defendant has raised triable issue indicating that he has a fair and bonafide defence, although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend. He has also relied upon the decision of Raj Duggal (supra) to contend that as the plaintiff did not inform the defendant about crossing of credit limit there is a fair dispute as regards the amount payable.

10. After considering the material on record, the learned trial Judge observed that the defence raised by the defendant is not substantial defence. In my opinion, the case falls in principle (e) of the decision of M/s Mechelec Engieners and Manufacturers (supra). The learned trial Judge granted leave to the defendant to defend subject to the defendant depositing Rs. 3 Lacs. The order is discretionary in nature. Having regard to the material on record and for the reasons given by the learned trial Judge, I do not find that any case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

11. At this stage, Mr. Thakkar seeks two weeks extension of time for depositing the amount as ordered by the trial Court. He further assures that the defendant will not apply for further extension of time.

12. In view thereof, notwithstanding dismissal of petition, the

time to deposit the amount as also for filing written statement is extended for a period of two weeks from today, with express understanding that no application for extension of time shall be made.

(R.G.KETKAR, J.)